87-520

No. 87-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PAUL E. MERRELL,
Petitioner,

v.

LEE THOMAS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

and

CIBA-GEIGY CORPORATION, DOW CHEMICAL COMPANY, VELSICOL CHEMICAL CORPORATION, NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION, MONSANTO COMPANY, E.I. DU PONT DE NEMOURS & CO., OREGONIANS FOR FOOD AND SHELTER,
Respondent-Intervenors

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. Did the Ninth Circuit err in finding that the United States Environmental Protection Agency (EPA) need not comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370a, when EPA registers pesticides pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y?

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings below are all identified in the caption.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this case was issued on December 31, 1986, and is reported at 807 F.2d 776 (9th Cir. 1986). The opinion is reprinted at Appendix A. On April 6, 1987, the Ninth Circuit denied a petition for rehearing. The denial of the petition for rehearing is unreported, but is reprinted in Apendix B. The opinion of the district court is reported at 608 F. Supp 644 (D. Or. 1985), and is reprinted in Appendix C.

JURISDICTION

The Court has jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1). The Ninth Circuit's denial of the petition for rehearing was entered on April 6, 1987. *See* Appendix C. This petition is therefore timely. *See* Rule 20; 28 U.S.C. § 2101(c).

STATUTES

Section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2), provides:

> all agencies of the Federal Government shall—
>
> . . . .
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The relevant sections of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y are lengthy and are therefore set out in Appendix D, as provided by Rule 21.1(f).

STATEMENT OF THE CASE

On May 2, 1984, Paul Merrell, proceeding *in forma pauperis*, filed suit in federal district court for the District of Oregon, seeking to enjoin defendant Environmental Protection Agency (EPA) from permitting the continued registration of seven pesticides until the EPA complied with NEPA. Jurisdiction in the court of first instance was based upon federal question jurisdiction granted by 28 U.S.C. § 1331. Plaintiff's cause of action arose under the Adminstrative Procedure Act (APA), 5 U.S.C. §§ 702, 706.

Ciba-Geigy Corp, the Dow Chemical Company, the Velsicol Chemical Corporation, the National Agricultural Chemical Association, the Monsanto Company, E.I. du Pont de Nemours & Co., and Oregonians for Food and Shelter were allowed to intervene as defendants.

Cross-motions for summary judgment were argued before the district court on December 12, 1984. The district court orally granted defendants' motion for summary judgment at that time. Pursuant to request by all parties involved, the district court issued its written opinion on May 20, 1985. *Merrell v. Thomas*, 608 F. Supp. 644 (D. Or. 1985); Appendix C.

On July 18, 1985, plaintiff appealed the decision of the district court. On December 31, 1986, the Ninth Circuit affirmed the decision of the district court on grounds other than those relied upon by the district court. *Merrell v. Thomas*, 807 F.2d 776 (9th Cir. 1986); Appendix A. Plaintiff's petition for rehearing was denied on April 6, 1987. Appendix B.

REASONS FOR GRANTING THE WRIT

The issue presented in this petition is important for four reasons. First, the Ninth Circuit concluded that although it was possible for the EPA to comply with both NEPA and FIFRA, EPA need not comply with NEPA because NEPA is "incompatible" with FIFRA. 807 F.2d at 778. In *Flint Ridge Development Co. v. Scenic Rivers Assoc.*, 426 U.S. 776, 778 (1976), however, this Court held that agencies may escape their NEPA

obligations only when other statutory obligations create a "clear and unavoidable" and "irreconcilable and fundamental" conflict with NEPA. The Ninth Circuit allowed EPA to ignore NEPA without such a conflict, and its opinion therefore is at odds with *Flint Ridge*.[1]

Second, the Ninth Circuit's opinion in this case will encourage other federal agencies to argue that they need not comply with NEPA because their statutory obligations are also "incompatible" with NEPA. But agency arguments that environmental considerations are incompatible with other statutory obligations prompted Congress to adopt NEPA's action-forcing provisions in the first instance.[2] The Ninth Circuit's opinion is thus at cross-purposes with NEPA.

Third, the Ninth Circuit's opinion allows a major federal program to escape entirely the procedures required by NEPA.

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[1] The Ninth Circuit's opinion in this case also is in conflict with opinions in other circuits that have followed *Flint Ridge* and held that agencies must demonstrate a direct and irreconcilable conflict before they may escape their NEPA obligations. *See National Audubon Society v. Watt*, 678 F.2d 299, 308-09 (D.C. Cir. 1982) (agencies may avoid NEPA only "when there is a clear conflict between NEPA's commands and those of another statute."); *Conservation Law Foundation v. General Services Administration*, 707 F.2d 626, 635 (1st Cir. 1983) (NEPA yields to other statutes only when there is a "clear and unavoidable" conflict); *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201, 206-07 (5th Cir. 1978) *cert. denied* 439 U.S. 966 (1978) (conflict must be "both fundamental and irreconcilable."); *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 833 (6th Cir. 1981) ("agency's authorizing legislation . . . [must] expressly prohibit [compliance with NEPA] or make full compliance impossible" before NEPA compliance is excused). *See generally* Note, *The Environmental Impact Statement Requirement In Agency Enforcement Adjudication*, 91 Harv. L. Rev. 815, 825 (1978).

[2] In introducing the provisions of NEPA in the Senate, Senator Muskie explained that action-forcing legislation was necessary because "[i]n hearing after hearing agencies of the Federal Government have argued that their primary authorization...takes precedence over [environmental requirements]." 115 Cong. Rec. 29,053 (1969). Anticipating the arguments of EPA in this case, Congress stated: "No agency shall use an excessively narrow construction of its existing statutory authorizations to avoid compliance." Conf. Rep. No. 795, 91st Cong., 1st Sess., *reprinted in* 1969 U.S. Code Cong. & Ad. News 2767, 2770.

EPA's registration of pesticides is a necessary predicate to *all* uses of pesticides, and therefore has more impact on the environment than any other federal program involving pesticides. Individual agencies who *use* registered pesticides must comply with NEPA,[3] yet the Ninth Circuit's opinion allows EPA, the gatekeeper to *all* uses of pesticides, to escape NEPA compliance. No court has granted any other federal agency program such a sweeping exemption from NEPA.

Fourth, the Ninth Circuit's opinion suggests that whenever Congress passes agency-specific legislation (such as FIFRA) subsequent to the adoption of a law that applies to all agencies generally (such as NEPA), Congress must affirmatively state that the generally applicable law is not repealed. This is at odds with this Court's announced rules of statutory construction, and would impose an impossible burden on Congress.

INTRODUCTION

As the Ninth Circuit put it: "This appeal raises a single legal issue: 'whether the Environmental Protection Agency (EPA) must comply with the National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. §§ 4321-4370a, when it registers

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[3] *See, e.g., Save Our ecoSystems v. Clark*, 747 F.2d 1247 (9th Cir. 1984) (NEPA applies to use of herbicides on federal forest lands); *Southern Oregon Citizens Against Toxic Sprays v. Clark*, 720 F.2d 1475 (9th Cir. 1983), *cert. denied* 469 U.S. 1028 (1984) (same); *Oregon Environmental Council v. Kunzman*, ___ F.2d ___ (9th Cir. May 12, 1987) (NEPA applies to nationwide gypsy moth insecticide program); *Robinson v. Knebel*, 550 F.2d 422, 425 (8th Cir. 1977) (NEPA applies to use of herbicides and other pesticides in recreation development); *Citizens Against Toxic Sprays v. Bergland*, 428 F. Supp. 908 (1977) (NEPA applies to use of herbicides on federal forest lands); *E.D.F. v. Hardin*, 325 F. Supp. 1401 (D.D.C. 1971) (NEPA applies to fire ant insecticide program); *Wisconsin v. Butz*, 389 F. Supp. 1065 (D. Wis. 1975) (use of herbicides on federal forest lands); *Lee v. Resor*, 348 F. Supp. 389 (D. Fla. 1972) (aquatic use of herbicide to kill water hyacinths); *National Organization for Reform of Marijuana Laws v. U.S.*, 452 F. Supp. 1226 (D.D.C. 1978) (use of herbicide to eradicate marijuana); *Alaska Survival v. Weeks*, 12 E.L.R. 20949 (D. Alaska 1982) (use of herbicides to maintain railroad right-of-way).

pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) 7 U.S.C. §§ 136-136y.' " 807 F.2d at 776.

All parties agree that by its plain language NEPA applies to EPA's registration of pesticides, and that EPA is not exempted by statute from compliance with NEPA when considering such applications. EPA, however, does not apply and never has applied NEPA when it processes registration applications.

EPA presented two arguments to the Ninth Circuit to excuse its refusal to comply with NEPA. First, EPA argued that the procedures it follows when registering pesticides are the "functional equivalent" of the procedures required by NEPA, and therefore formal compliance with NEPA is unnecessary. The Ninth Circuit correctly declined to adopt this argument. 807 F.2d at 781.[4]

Second, EPA argued that the requirements of FIFRA and NEPA conflict with one another, making it impossible to comply with both. The Ninth Circuit rejected this argument in part. The panel found that the process for registering pesticides did not *preclude* NEPA compliance, but then found that FIFRA's registration process was "incompatible with the lengthy research and hearings that are ordinarily part of preparing an EIS." 807 F.2d at 778. Based upon this finding, the panel refused to order EPA to comply with NEPA. The panel thus judicially legislated an exemption from NEPA because it believed that NEPA would inconvenience EPA in its efforts to register pesticides under FIFRA. That, however, is a decision for Congress, not the courts, to make.[5]

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[4] The Ninth Circuit recognized that the procedures under FIFRA for notifying and involving the public in pesticide registration decisions "obviously fall short of an EIS requirement. . . ." 807 F.2d at 778. The Circuit stated: "we are hesitant to adopt the 'functional equivalence' rationale. . . ." 807 F.2d at 781. Although other courts have adopted a "functional equivalence" test to excuse EPA from complying with NEPA when it acts to protect the environment, no other court has concluded that the FIFRA registration process is the functional equivalent of the NEPA process.

[5] Congress has explicitly exempted *some* programs of *some* agencies (including EPA) from NEPA when Congress determined that despite NEPA's

I. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH *FLINT RIDGE DEVELOPMENT CO. v. SCENIC RIVERS ASSOC.*

The Ninth Circuit's conclusion that EPA need not comply with NEPA because NEPA and FIFRA are "incompatible" conflicts with this Court's opinion in *Flint Ridge Development Co. v. Scenic Rivers Assoc.*, 426 U.S. 776 (1976). The Court in *Flint Ridge* found that agencies may be excused from NEPA compliance *only* when "there would be a clear and fundamental conflict of statutory duty." 426 U.S. at 791. The Court went on to find in *Flint Ridge* that the agency in that case was excused from NEPA compliance because it "*[could not]* comply with the statutory duty . . . and simultaneously prepare impact statements on proposed developments." *Id.* (emphasis added).[6] No such conflict exists between NEPA and the FIFRA registration process.

The Ninth Circuit's reasons for concluding that FIFRA is "incompatible" with NEPA actually demonstrate that there is no "fundamental conflict" between the two statutes. The panel first found that the provisions in FIFRA for public notice of EPA

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applicability, an agency should be exempt. *See, e.g.*, 33 U.S.C. § 1371(c)(1); 50 U.S.C. § 2096(i); 50 U.S.C. § 2095(h); 45 U.S.C. § 1212(a); 45 U.S.C. § 1207(b); 43 U.S.C. § 1638; 42 U.S.C. § 10134(a)(D)(b); 42 U.S.C. § 10133(d)(c); 42 U.S.C. § 10132(e); 42 U.S.C. § 8473; 42 U.S.C. § 7364(c); 33 U.S.C. § 1371(c); 30 U.S.C. § 1291(d); 30 U.S.C. § 1251(a); 30 U.S.C. § 185; 25 U.S.C. § 2104(b); 25 U.S.C. § 640d-26(a); 21 U.S.C. § 343(p); 15 U.S.C. § 793(d); 15 U.S.C. § 793(c)(2); 15 U.S.C. § 791(c). *See also* Bonine, *The Law of Environmental Protection* 9 (West 1984).

Congress plainly knows how to expressly exempt an agency program if it wishes to do so — and it has *not* exempted the registration of pesticides. The panel did refer to a proposed 1986 amendment to FIFRA that *would have* exempted pesticide registration from NEPA, but this amendment was not adopted. *See* 807 F.2d at 779-80. The introduction of a bill that would exempt EPA from NEPA compliance implies that Congress believes EPA *is* subject to NEPA.

[6] *See also* 42 U.S.C. § 4332 (NEPA shall be implemented "to the fullest extent possible. . . .").

decisions on registration applications "obviously fall short of an EIS requirement, both because the Administrator will not have to publish the notice with respect to many applications, and because the notice does not contain the information contained in an EIS." 807 F.2d at 778. But the fact that FIFRA does not *require* the same public participation as NEPA does not mean that there is a conflict between the two statutes. If FIFRA prohibited the type of public participation that NEPA requires there would be a conflict. But FIFRA does not prohibit such public participation, and there is therefore no conflict. Under the Ninth Circuit's reasoning any statute that doesn't already provide for the public participation required by NEPA would be "incompatible" with NEPA. Such a rule would make NEPA itself superfluous.

Second, the panel stated that under FIFRA the Administrator is expected to act "as expeditiously as possible" on pesticide registration applications. 807 F.2d at 778 (citing 7 U.S.C. § 136a(3)). The panel also cited legislative history suggesting that Congress "expected" the Administrator to reach a decision on applications within three months of receiving an application. *Id.* From this the panel inferred that there would not be sufficient time to comply with NEPA prior to acting on registration applications.

FIFRA, however, does not require that EPA act on registration applications within a fixed time period. In reality, the Administrator seldom reaches a decision on even a *conditional* registration within three months. *See* J. Davies, *The Effects of Federal Regulation On Chemical Industry Innovations,* 46 Law and Contemporary Problems 41, 52 (Summer, 1983) ("The National Agricultural Chemicals Association (NACA) estimates that in 1981 the average time consumed from submission of a registration application for a new pesticide chemical to granting of a conditional registration was twenty-four months.")[7]

[7] So far as plaintiffs are aware, no unconditional pesticide registrations have been granted by EPA since the 1972 FIFRA amendments. *See Save Our ecoSystems v. Clark,* 747 F.2d 1240, 1246 n.9 (9th Cir. 1984).

Because conditional registrations take EPA less time to process than final registrations, EPA would have even more time to comply with NEPA prior to approving final registration.[8]

Third, the panel found that FIFRA requires EPA to make registration information available to the public within thirty days after a decision to register, and allows EPA to withhold *some* trade secret information. 807 F.2d at 778. But again the panel has merely pointed out that FIFRA does not go as far as NEPA. The panel does not identify a *conflict* between NEPA's environmental disclosure provisions and FIFRA's trade secret withholding provisions. In fact, in a footnote to this section of its opinion, the panel states:

> FIFRA's disclosure provisions do not necessarily conflict with the letter of NEPA. NEPA makes EIS's available to the public, subject to the requirements of the Freedom of Information Act. . . FOIA exempts from public disclosure matters specifically exempted by other statutes, trade secrets, and privileged or confidential information. . . . These exemptions would encompass all the information that FIFRA withholds from the public.

807 F.2d at 778, note 1. In other words, NEPA does not compel EPA to reveal any information that FIFRA directs it to withhold, and there is therefore no conflict between the two statutes. The panel nevertheless speculates that "if NEPA applied to FIFRA's registration procedure, it would provide an additional legal basis upon which disclosure could be sought. And the standards for disclosure under NEPA and FOIA might well differ from the standards under FIFRA." *Id.* The panel does not identify the "different standards" that might apply,[9] and does

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[8] In *Flint Ridge* the agency was excused from NEPA compliance because it was statutorily *required* to act within thirty days, and an EIS could not be prepared and circulated within that time period. 426 U.S. at 788-90. No such deadline is imposed upon EPA under FIFRA. There is more than sufficient time to comply with NEPA under FIFRA's registration scheme.

[9] The Freedom of Information Act (FOIA) requires that agencies disclose (upon request) all information not covered by one of FOIA's nine exemptions.

not suggest that NEPA would compel the disclosure of information that FIFRA requires to be withheld. The fact that NEPA would provide an "additional legal basis" for seeking the disclosure of information does not in any way demonstrate a conflict between NEPA and FIFRA.[10]

The Ninth Circuit's conclusion that EPA need not comply with NEPA because NEPA's requirements are "incompatible" with FIFRA is incorrect as a factual matter and contrary to the "irreconcilable conflict" standard established by this Court in *Flint Ridge*. This error is not merely technical or formulaic: the Ninth Circuit expressly recognized that it was *possible* to comply with both NEPA and FIFRA, but then judicially excused EPA from such compliance. If the Ninth Circuit's decision is allowed to stand, other agencies will argue that they need not comply with NEPA because their non-NEPA responsibilities are "incompatible" with NEPA, and Congress' purpose in adopting NEPA will be frustrated.

II. THE NINTH CIRCUIT IMPROPERLY LEGISLATED AN EXEMPTION FROM NEPA FOR EPA

The Ninth Circuit did not articulate a specific rule of statutory construction that would justify the judicial exemption from NEPA granted by the panel.[11] The court's reasoning, however, suggests that the court believed Congress either impliedly repealed NEPA, or amended NEPA by acquiescing in EPA's

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See 5 U.S.C. § 552(a)(3). FOIA applies to FIFRA information in the same way it applies to all government documents. No different standards would apply, regardless of whether a FOIA request were submitted in conjunction with a NEPA proceeding or on its own.

[10] FIFRA does not allow EPA to withhold information regarding environmental impacts. *See* 7 U.S.C. § 136h(d); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 995-96 (1983). EPA could therefore disclose such information without running afoul of FIFRA.

[11] By excusing EPA from NEPA compliance even though NEPA's plain language admittedly applies to EPA, the panel's opinion unquestionably legislates an amendment to NEPA. The Constitution, however, allocates

noncompliance with NEPA.[12] Despite this reasoning, the panel never discussed this Court's opinions on implied repeals and congressional acquiescence.

The Ninth Circuit frames the question before it as: "did Congress intend to impose NEPA's procedures on top of the FIFRA registration procedure?" 807 F.2d at 778.[13] That question has already been answered in the affirmative by this Court. In *Flint Ridge, supra*, the Court states: "NEPA's instruction that *all* federal agencies comply with the impact statement requirement—and with *all* the other requirements of § 102—'to the fullest extent possible,'. . . is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle." 426 U.S. at 727 (emphasis added).

Congress unquestionably intended to superimpose NEPA on all federal agency actions:

> The purpose of the new language is to make it clear that each agency of the federal government shall comply with the directions set out in. . . [Section 102(2)]

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legislative power to Congress. U.S. Const. Art. 1, section 1 ("All legislative powers herein granted shall be vested in a Congress of the United States.") "[I]t is . . . the exclusive province of the Congress . . . to formulate legislative policies and mandate programs and projects. . . ." *TVA v. Hill*, 437 U.S. 153, 194 (1977).

[12] The Ninth Circuit stated, for example, that "[t]he differences between FIFRA's registration procedure and NEPA's requirements indicate that Congress did not intend that NEPA apply." 807 F.2d at 778 (emphasis added). The panel also stated: "We infer that Congress believes that analyses in support of registration currently are an adequate substitute for an EIS in the FIFRA context. Congress does not intend to make NEPA apply." 807 F.2d at 780 (emphasis added). Plainly the panel was struggling to find the proper label for its decision to excuse EPA from NEPA.

[13] The question assumes that FIFRA was adopted before NEPA, when in fact NEPA was adopted prior to the relevant FIFRA amendments. NEPA was adopted in 1970 (83 Stat. 852) while the relevant FIFRA amendments were adopted in 1972. 86 Stat. 975.

> unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. . . . Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. . . . [N]o agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.

Conference Report, 115 Cong. Rec. (Part 29) 39702-703 (1969) (*quoted in Flint Ridge, supra,* 426 U.S. at 727).

The question is not whether Congress intended to superimpose NEPA on FIFRA. The question is whether Congress, when it amended FIFRA, intended to repeal, amend, or otherwise alter NEPA insofar as it applied to the registration of pesticides under FIFRA. The answer is that Congress never stated or implied that it intended to repeal NEPA for purposes of pesticide registration. The Ninth Circuit should not be allowed to judicially legislate such a repeal.

A. Congress Did Not Impliedly Repeal NEPA

As a general matter repeals by implication are not favored. In *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 189 (1978), this Court stated: " 'Only a clear repugnancy between the old . . . and the new [law] results in the former giving way. . . . ' " (quoting *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 456-57 (1945). In practical terms, this rule means that "in the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari,* 417 U.S. 535, 550 (1974).[14] A corollary of this rule is that courts "*must* read . . . statutes to give effect to each if [they] can do so while preserving their sense and purpose." *Watt v. Alaska,* 451 U.S. 259, 267 (1980) (emphasis added).

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[14] This echoes the Court's language in *Flint Ridge* governing the circumstances under which an agency's compliance with NEPA will be excused.

EPA made no affirmative showing of any intent to repeal NEPA on the part of Congress. The Ninth Circuit's opinion does not cite any language in FIFRA or its legislative history suggesting that Congress intended to repeal NEPA with respect to pesticide registration under FIFRA. In the absence of an affirmative showing of intent to repeal NEPA, EPA must show an irreconcilable conflict between NEPA and FIFRA. As explained above, it has not done this. It cannot make such a showing, because there is no conflict between NEPA and FIFRA. The Ninth Circuit's conclusion that Congress had impliedly repealed NEPA with regard to pesticide registration was therefore incorrect.

B. Congress Did Not Amend NEPA by Acquiescing in EPA's Noncompliance

The Ninth Circuit stated: "When Congress amended FIFRA in 1975, 1978, and 1984, the EPA had interpreted FIFRA so as not to require compliance with NEPA." 807 F.2d at 779. The panel then invoked the rule that Congressional failure to disagree with long-standing agency interpretations is persuasive evidence that the agency interpretation is the one intended by Congress. *Id.* There are three problems with this. First, there is no evidence that EPA had officially interpreted FIFRA so as not to require compliance with NEPA when registering pesticides. While it is true that as a matter of practice EPA did not comply with NEPA when it registered pesticides, the Ninth Circuit does not cite anything to support its bald assertion that EPA had "interpreted" FIFRA to exclude compliance with NEPA in the registration of pesticides.

Second, there is no evidence that Congress was aware of EPA's "interpretation"—if there was one. "The inference of Congressional acquiescence. . . is undermined where, as here, there is no evidence that the Department's interpretation was brought to Congress' attention." *Blackfeet Tribe of Indians v. State of Montana,* 729 F.2d 1192, 1202 (9th Cir. 1984) (noting also that there, as here, the agency's interpretation was informal, and not based on any published analysis). *See also Sedima, SPRL v. Imrex Co., Inc.*, 743 U.S. 479, 496 n.13. ("congressional silence, no matter how 'clanging' cannot override the

words of the statute."); *Girourd v. United States;* 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law.").

Third, no matter how long-standing an agency's interpretation, an agency can neither change the plain language of a statute nor escape its clear statutory obligations simply because the agency's interpretation ignores that plain language. *SEC v. Sloan,* 436 U.S. 103, 118 (1978). "[A]n agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *FMC v. Seatrain Lines Co.,* 411 U.S. 726, 745 (1972). Even if EPA had formally interpreted FIFRA as excusing NEPA compliance, and had informed Congress of that interpretation, EPA could not by so doing change the plain language of the Act.

C. NEPA Does Not Impose Substantive Standards That Conflict With FIFRA's Standards

The Ninth Circuit also based its conclusion that Congress did not intend NEPA to apply to pesticide registration on the fact that NEPA and FIFRA contain different "standards." 807 F.2d at 780-81. The panel did not identify these standards, but apparently believed that NEPA imposes a substantive obligation that might prohibit EPA from registering pesticides otherwise eligible for registration under FIFRA. This Court has recognized, however, that NEPA does *not* impose substantive obligations on agencies. NEPA simply requires agencies to disclose and consider the environmental impacts of their actions. In *Strycker's Bay Neighborhood Council v. Karlen,* 444 U.S. 223 (1980) the Court noted that a federal court may only ensure that the agency is question has "considered the environmental consequences" of its action. 444 U.S. at 227. *See also Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 558 (1978) (NEPA imposes duties upon agencies that are "essentially procedural.").

NEPA does not require that the agency elevate environmental concerns over legitimate non-environmental considerations. *Strycker's Bay, supra,* 444 U.S. at 223. It requires only that environmental considerations be brought to the agency's attention and that they receive fair consideration. In the words of this

Court, NEPA requires that agencies take a "hard look" at the environmental consequences. *Kleppe v. Sierra Club,* 427 U.S. 390, 410 (1976). Applying NEPA to EPA's registration of pesticides therefore would not, as the Ninth Circuit implies, prevent EPA from registering any otherwise eligible pesticides. Applying NEPA would only require EPA to disclose more fully the impacts of such registration.

The Ninth Circuit stated that: "Two years after enacting NEPA, Congress amended FIFRA to require the EPA to consider environmental effects. The FIFRA amendments would have been superfluous if Congress intended NEPA to apply." 807 F.2d at 780. This is a surprising conclusion, since the panel had just concluded that the FIFRA process was *not* equivalent to the NEPA process. *See* 807 F.2d at 778. Many agencies are required by statutes adopted subsequent to NEPA to consider environmental effects,[15] yet *those* agencies must comply with NEPA. NEPA complements, rather than duplicates, other statutory requirements that environmental effects be considered.

D. Congress Is Not Required to Renew Legislation of General Applicability Every Time It Adopts New Legislation

The Ninth Circuit states: "In amending FIFRA, Congress refrained from incorporating the NEPA standard without modification." 807 F.2d at 780. This statement suggests that Congress must expressly state, in legislation adopted *subsequent* to NEPA, that NEPA applies to that legislation. It is an astounding notion that Congress must mention every statute of general applicability before such statutes apply to subsequently adopted legislation. Under such a rule, Congress would have to explain that NEPA, the Freedom of Information Act, and even the Administrative Procedure Act applied every time it adopted legislation. Fortunately, there is *no* previous jurisprudence that advocates such an approach.

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[15] *See e.g.*, the National Forest Management Act, 16 U.S.C. §§ 1600-1604; the Federal Lands Policy and Management Act, 43 U.S.C. §§ 1701-1784; the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407; the Clean Water Act, 33 U.S.C. §§ 1251-1376.

In fact, previous opinions in this Court have made it plain that if Congress is silent regarding a statute of general applicability (such as NEPA), and the statute *can* be reconciled with subsequent and more specific legislation, it *must* be reconciled. The Court in *Watt v. Alaska, supra,* 451 U.S. at 267, stated: "We must read the statutes to give effect to each if we can do so while preserving their sense and purpose." *See also Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976), *quoting Morton v. Mancari,* 417 U.S. 535 (1974).

The Ninth Circuit's opinion in the instant case does not attempt to reconcile NEPA and FIFRA. Rather, it goes out of its way to strike down NEPA to the extent it applies to the registration of pesticides, in spite of the fact that EPA *can* comply with *both* FIFRA and NEPA. It is for Congress, and not the courts, to determine whether to exempt EPA from NEPA. The courts' role is to apply the law as written. That did not happen in this case.

CONCLUSION

The Ninth Circuit in this case judicially legislated an exception for EPA from NEPA. Such an exception is not justified by an irreconcilable conflict between NEPA and FIFRA, by a finding that Congress intended NEPA not to apply to FIFRA, or by any of the language or legislative history of FIFRA. An exemption from NEPA may only be granted by Congress. Plaintiff therefore respectfully requests that the Court issue a writ of certiorari to review the opinion of the Ninth Circuit in this case.

Respectfully submitted,

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Dated this second day of July, 1987.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL E. MERRELL, Plaintiff-Appellant, v. LEE THOMAS, Defendant-Appellee, and CIBA-GEIGY CORPORATION, et al., Defendants-Intervenors,	)	No. 85-4026 DC# CV-84-6185-E OPINION

Appeal from the United States District Court
for the District of Oregon
James M. Burns, District Judge, Presiding
Argued and Submitted October 2, 1986
San Francisco, California

Before: SNEED, KENNEDY, and KOZINSKI,
Circuit Judges.

SNEED, Circuit Judge:

This appeal raises a single legal issue: whether the Environmental Protection Agency (EPA) must comply with

the National Environmental Policy Act of1969 (NEPA), 42 U.S.C. §§ 4321-4370a, when it registers pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y. The district court ruled that it need not. After examining FIFRA's registration procedure, its registration standard, and the applicable review procedures, we conclude that Congress did not intend that the EPA should comply with NEPA. Therefore, we affirm.

I.

FACTS AND PROCEEDINGS BELOW

Appellant Paul E. Merrell, plaintiff below, sued to enjoin the EPA from continuing to register seven herbicides which his local road department sprayed along the road leading to his wife's farm. Merrell charged that the registrations were invalid because the EPA

and its predecessor agency had not made public the information on which they were based. Merrell alleged that the EPA thereby violated NEPA and its implementing regulations, 40 C.F.R. §§ 1500.1-1508.28, particularly insofar as the EPA failed either to prepare a site-specific environmental impact statement (EIS) for each right-of-way use registration, or to explain why no EIS was necessary under 42 U.S.C. § 4332(2)(C). Complaint for Injunctive Relief, Excerpt of Record (E.R.) at 1-10.

After defendant Ruckelshaus answered for the EPA, Merrell moved for partial summary judgment. Subsequently, the district court allowed as defendant intervenors Ciba-Geigy Corporation, Dow Chemical Company, Velsicol Chemical Company, the National Agricultural Chemicals Association, Oregonians for Food

and Shelter, Monsanto Company, and E.I. Dupont DeNemours & Company. Defendant and defendant intervenors moved for judgment on the pleadings. The National Resources Defense Council filed a brief in support of plaintiff's motion for summary judgment. On May 20, 1985, the district court entered summary judgment for defendant Thomas, who had been substituted for Ruckelshaus under Federal Rule of Civil Procedure 25(d). Merrell timely appealed on July 18, 1985.

II.

STANDARD OF REVIEW

This court reviews de novo a lower court's grant of summary judgment. Defendant is entitled to summary judgment if, viewing the evidence in a light most favorable to plaintiff, no genuine issue of material fact remains and defendant is entitled to judgment as a matter of law. Gabrielson v. Montgomery Ward & Co., 785

F.2d 762, 764 (9th Cir. 1986). If plaintiff will bear the burden of proof at trial as to an element essential to its case, and plaintiff fails to make a showing sufficient to establish the existence of that element, then the court may enter summary judgment against plaintiff. Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2552-53 (1986).

III.

FIFRA'S REGISTRATION PROCEDURE

A. Pre-1972 Procedures

Since 1947, pesticides that move in interstate commerce have had to be registered with the Federal Government. FIFRA, Pub. L. No. 80-104, § 4(a), 61 Stat. 163, 167 (1947). To register a pesticide, an applicant had to submit its name, its label, the claims made for it and, "if requested," a description of tests made and their results. Id. Under the original

act, an applicant who failed to meet even these minimal standards could nevertheless obtain a "protest registration" for his product. Id. § 4(c), 61 Stat. at 168. In 1964, Congress eliminated the protest registration. A disappointed applicant could instead request a referral to an advisory committee or a public hearing. Act of May 12, 1964, Pub. L. No. 88-305, § 3, 78 Stat. 190, 190-91. Otherwise, there was no opportunity for public participation.

In 1970, when FIFRA's pesticide registration procedure was as described above, Congress passed NEPA, Pub. L. No. 91-190, 83 Stat. 852 (1970). Section 102 of NEPA requires that :

> all agencies of the Federal Government shall--
>
> . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2). This describes the EIS. Preparation of an EIS is a procedural obligation designed to assure that agencies give proper consideration to the environmental consequences of their actions. Aberdeen & R. R. R. v. Students Challenging Regulatory Agency Procedures (SCRAP), 422 U.S. 289, 319 (1975). The question before us is, did Congress intend to superimpose NEPA's procedures on top of the FIFRA registration procedure?

B. The 1972 Amendments

After 1970, the EPA did not change its FIFRA regulations to require preparation of EIS's. In 1972, Congress

comprehensively amended FIFRA, in part in response to "increasing public concern over the uses and application of pesticides [reflecting] expanded interest in environmental protection by many citizens." H.R. Rep. No. 511, 92d Cong., 1st Sess. 4 (1971). Yet Congress gave no indication that it thought NEPA would apply. Instead, Congress created a registration procedure within FIFRA to ensure consideration of environmental impact--a procedure that apparently made NEPA superfluous. Congress also created limited opportunities for public notice and public participation in FIFRA's registration procedure. But the 1972 amendments did not make FIFRA a carbon copy of NEPA. It reflected a compromise between environmentalists, farmers, and manufacturers. Id. at 5. The differences between FIFRA's registration procedure and NEPA's requirements indicate that Congress

did not intend that NEPA apply.

First, if an application for a pesticide registration involved a new active ingredient or a changed use pattern, the 1972 amendments required the Administrator to place a notice in the Federal Register before he made his decision. Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, § 2, 86 Stat. 973, 980 (amending FIFRA section 3(c)(4)). This is the only provision for public notice prior to a decision to register a pesticide. It obviously falls short of an EIS requirement, both because the Administrator will not have to publish the notice with respect to many applications, and because the notice does not contain the information contained in an EIS.

Second, the 1972 amendments required the Administrator to act "as

expeditiously as possible" on an application, id., 86 Stat. at 980 (amending FIFRA section 3(c)(3)), and Congress expected him to reach a decision within three months of receiving an application, H.R. Rep. No. 511, 92d Cong., 1st Sess. 20 (1971). Such a time frame is incompatible with the lengthy research and hearings that are ordinarily part of preparing an EIS. Compare Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 788-91 & 789 n.10 (1976) (statutory requirement that filing take effect in thirty days means that NEPA cannot apply) with Jones v. Gordon, 792 F.2d 821, 826-27 (9th Cir. 1986) (agency regulation requiring publication of notice "as soon as practicable" after application is deemed sufficient does not prevent NEPA from applying).

Third, the 1972 amendments

provided that the Administrator would make available to the public the information on which he based a decision to register a pesticide within thirty days of that decision. Federal Environmental Pesticide Control Act of 1972, § 2, 86 Stat. at 980 (amending FIFRA section 3(c)(2)). But the Administrator would not release information if it was test data for which a subsequent user would have to compensate an applicant, or if it contained trade secrets. Id., 86 Stat. at 979-80, 989 (amending FIFRA sections 3(c)(1)(D), 3(c)(2), 10(b)). NEPA does not contain equivalent restrictions.[1]

Thus, when Congress revised FIFRA in 1972, it designed a registration procedure with public notice and public participation provisions that differ materially from those that NEPA would require.

C. Post-1972 Amendments

When Congress amended FIFRA in 1975, 1978, and 1984, the EPA had interpreted FIFRA so as not to require compliance with NEPA. And "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245, 3255 (1986) (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974) (footnotes omitted)).

The 1978 amendments to FIFRA provide further evidence that Congress did not intend to affix NEPA to FIFRA. These amendments made important modifications to the registration procedure. They responded to a crisis: the registration process had

"come to a virtual halt" because of litigation spawned by the data compensation and trade secret provisions of the 1972 amendments. H.R. Rep. No. 663, 95th Cong., 1st Sess. 18, reprinted in 1978 U.S. Code Cong. & Ad. News 1988, 1991. The 1978 amendments aimed to lighten the "regulatory burdens upon the industry, pesticide users, and non-Federal regulatory agencies." S. Rep. No. 334, 95th Cong., 1st Sess. 26-27 (1977). To this end, they created a "conditional registration procedure" that waived or postponed some data requirements for registering certain pesticides. Federal Pesticide Act of 1978, Pub. L. No. 95-396, § 6, 92 Stat. 819, 825-26. They also liberalized the standards for registering pesticides for minor uses, required the Administrator to promulgate simplified registration regulations, and permitted the Administrator to waive proof

of efficacy. Id. §§ 3-5, 92 Stat. at 824-25. Finally, they rewrote the trade secret disclosure section, id. § 15, 92 Stat. at 829-32, striking a careful balance between "the legitimate right of the public to know the basis for agency decisions and the right of a business to see that the manufacturing process and other trade secret information controlled by the Act are not disclosed for the commercial advantage of competing business interests," H.R. Rep. No. 663, 95th Cong., 1st Sess. 18-19, reprinted in 1978 U.S. Code Cong. & Admin. News 1988, 1991-92. The Supreme Court upheld the new disclosure provisions against a Fifth Amendment taking clause challenge. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1983).

To apply NEPA to FIFRA's registration process would sabotage the delicate machinery that Congress designed

to register new pesticides. It would increase a regulatory burden that Congress intentionally lightened in 1978 and create new opportunities for litigation where litigation was recently quelled. "NEPA was not intended to repeal by implication any other statute." United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 694 (1973). Therefore, we will not apply NEPA here.

Congress is contemplating further changes to FIFRA. Both the House and the Senate passed bills amending FIFRA during the second session of the 99th Congress. 132 Cong. Rec. H11,172-201 (daily ed. Oct. 16, 1986); 132 Cong. Rec. S15,354-81 (daily ed. Oct. 7, 1986). Congress adjourned without enacting either bill. Both bills create new opportunities for public access to health, safety, and environmental data before the Administrator registers a

pesticide containing a new active ingredient or authorizes the initial food use of an active ingredient. 132 Cong. Rec. H11,172-73 (daily ed. Oct. 16, 1986) (section 101); 132 Cong. Rec. S15,355-56 (daily ed. Oct. 7, 1986) (section 101). If Congress intended the EPA to prepare an EIS before every registration, it would not have considered these limited disclosure provisions.

The Senate bill includes a declaration that analyses in support of registration are equivalent to an EIS and may be relied on by other federal agencies to comply with NEPA. 132 Cong. Rec. S15,376 (daily ed. Oct. 7, 1986) (section 820A). Senator Symms, who proposed the amendment, intended to excuse the Bureau of Land Management and other agencies from preparing EIS's before implementing programs using pesticides. Id. at S15,344-

45. Senator Symms was not concerned with defining the EPA's obligations under NEPA. Therefore, his proposal to declare analyses in support of registration to be equivalent to an EIS does not imply that an EIS is currently necessary for each FIFRA registration. The Symms amendment "merely restates current law," for the most part. Id. at S15,344. We infer that Congress believes that analyses in support of registration currently are an adequate substitute for an EIS in the FIFRA context. Congress does not intend to make NEPA apply.

IV.

FIFRA'S REGISTRATION STANDARD

As enacted in 1947, FIFRA defined a registration standard that took no account of environmental effects. FIFRA, Pub. L. No. 80-104, § 4(b), 61 Stat. 163, 167-68 (1947). The 1972 amendments added

two environmental criteria. The Administrator must determine that the pesticide "will perform its intended function without unreasonable adverse effects on the environment" and that "when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment." Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, § 2, 86 Stat. 973, 980-81 (amending FIFRA section 3(c)(5)) (codified at 7 U.S.C. § 136a(c)(5)). Hence, two years after enacting NEPA, Congress amended FIFRA to require the EPA to consider environmental effects. The FIFRA amendment would have been superfluous if Congress intended NEPA to apply.

Yet in amending FIFRA, Congress refrained from incorporating the NEPA

standard without modification. FIFRA's standard for denying registration, "unreasonable adverse effects on the environment," id., differs both from NEPA's standard for preparing an EIS, "significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), and from NEPA's definition of the scope of the EIS, "the environmental impact of the proposed action," id. The FIFRA standard distinctly balances the environmental harm of using a pesticide against its economic, social, and environmental benefits. 7 U.S.C. § 136(bb).

For example, unlike NEPA, FIFRA explicitly accommodates agriculture's need for pesticides--even environmentally risky pesticides. The 1975 amendments to FIFRA were primarily concerned with increasing agriculture's influence on registration decisions. They require the Administrator,

before issuing a notice of his intent to cancel or limit the registration of a pesticide, to prepare an "agricultural impact statement" and send it to the Secretary of Agriculture for comment and possible publication. Act of Nov. 28, 1975, Pub. L. No. 94-140, § 1, 89 Stat. 751, 751 (codified at 7 U.S.C. § 136d(b)). Commenting on this provision, the Senate Agriculture and Forestry Committee said:

> Because the basic thrust and principal responsibility of EPA are to protect the environment, the Committee does not see a need to broaden the impact statement to include the environment. There is clearly a need to consider the impact of EPA's decisions on agriculture if balance is to be achieved.

S. Rep. No. 452, 94th Cong., 1st Sess. 9, reprinted in 1975 U.S. Code Cong. & Admin.

News 1359, 1366. Therefore, FIFRA's registration standard, unlike NEPA's standard, reflects the need to balance environmental and agricultural impacts. This is a compromise adopted by Congress that should not be overturned by judges.

FIFRA's registration standard deviates from NEPA's standard in another way. The 1972 amendments to FIFRA specified that "[t]he Administrator shall not make any lack of essentiality a criterion for denying registration of any pesticide." Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, § 2, 86 Stat. 973, 981 (amending section 3(c)(5)) (codified at 7 U.S.C. § 136a(c)(6)). This means that "registration cannot be denied simply because the existence of an alternate means of control makes the new pesticide not essential." S. Rep. No. 838, 92d Cong., 2d Sess. 20,

reprinted in 1972 U.S. Code Cong. & Admin. News 3993, 4011. NEPA, however, explicitly requires that an EIS discuss "alternatives to the proposed action," 42 U.S.C. § 4332(2)(C)(iii), which implies that a course of action less environmentally harmful is to be preferred. This implication is not embodied in FIFRA. Judges should not engraft it on to FIFRA.

It is important to note that FIFRA's registration standard does not preclude all public participation in weighing environmental effects. To expedite pesticide registration, the EPA develops "registration standards" for products containing certain active ingredients. The standards describe what data the Administrator will require before registering a pesticide containing a given active ingredient. Under new regulations, the EPA will publish an annual docket of

registration standards under consideration and will invite public comment. EPA Pesticide Registration Standards, 40 C.F.R. §§ 155.23-155.34. Developing registration standards admittedly is a more general process than is preparing a site-specific EIS. Nevertheless, public participation at this level and in this manner is meaningful. We are reluctant to make redundant this limited public participation by invoking NEPA's requirement that an EIS be prepared. Even though the ultimate source of political power is the people, it does not follow that their participation in the processes of government at all levels always should be increased by all available means. Here, as elsewhere in life, a balance must be struck between, in this instance, participation and delegation. We see no reason to fault the balance that EPA has struck with respect to "registration

standards."

Our position that NEPA does not apply to pesticides registered under FIFRA has been taken by other courts as well. Speaking in terms of the "functional equivalence" of the EPA's procedures to NEPA's procedures, these courts conclude that formal compliance with NEPA would be wasteful and redundant. Wyoming v. Hathaway, 525 F.2d 66, 71-72 (10th Cir. 1975) (EPA need not prepare an EIS before cancelling or suspending registrations of three coyote poisons), cert. denied, 426 U.S. 906 (1976); Environmental Defense Fund, Inc. v. Environmental Protection Agency, 489 F.2d 1247, 1254-56 (D.C. Cir. 1973) (EPA need not prepare an EIS before cancelling registration of DDT with respect to nearly all uses); Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650, 661-62 (D.D.C. 1978) (EPA need not prepare an

EIS before granting an emergency exemption to a state to use an unregistered pesticide). While we hesitate to adopt the "functional equivalence" rationale, we are confident that Congress did not intend NEPA to apply to FIFRA registrations.

V.

FIFRA'S AGENCY REVIEW PROVISIONS

Merrell's challenge to the registrations of the pesticides used near his wife's farm fails, insofar as it is based on the EPA's failure to comply with NEPA. But that does not mean that Merrell is without a remedy. FIFRA contains procedures for cancelling or suspending pesticide registrations that invite public participation at several points. Furthermore, FIFRA provides for judicial review of important EPA decisions.

If the Administrator decides to deny, cancel, or suspend a pesticide

registration, he must notify the applicant and give public notice. 7 U.S.C. §§ 136a(c)(6), 136d(b), 136d(c). The district courts may review refusals to cancel or suspend registration. 7 U.S.C. § 136n(a).[2] Environmental organizations have acted under these notice and review provisions to challenge EPA refusals to cancel or suspend pesticide registrations. E.g., Environmental Defense Fund, Inc. v. Environmental Protection Agency, 465 F.2d 528, 531-32 (D.C. Cir. 1972); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 589 (D.C. Cir. 1971); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1096 (D.C. Cir. 1970).

Another agency review process, the so-called "Special Review," is potentially available to Merrell. IF "a validated test or other significant evidence rais[es] prudent concerns of

unreasonable adverse risk to man or to the environment," the Administrator may initiate a public interim administrative review of a pesticide registration. 7 U.S.C. § 136a(c)(8). Under new regulations, "any interested person" may ask the Administrator to act under this section. 40 C.F.R. § 154.10. Because the Administrator must release information supporting an application within thirty days of granting a registration, 7 U.S.C. § 136a(c)(2)(A), the public will be aware of registrations that it might wish to challenge.

Merrell is dissatisfied with these opportunities because they do not enable him to participate in a registration decision before it is made, as would an EIS requirement. Reply Brief of Appellants at 5-6. He also emphasizes that the Administrator ultimately has discretion

whether to initiate the process for suspending or cancelling a registration. Id. at 2-3.

The fact that FIFRA provides for substantial public participation only after a pesticide is registered does not make its review procedures illusory or worthless. In particular, FIFRA could provide Merrell with relief in this case. Merrell does not complain of pending applications for pesticide registration. Rather, he attacks use registrations for seven pesticides, most of which were approved years ago. Supplemental Excerpt of Record (S.E.R.) at 32-33. Cancellation or suspension of pesticide registrations therefore would be a suitable remedy.

Although FIFRA vests considerable discretion in the Administrator, interested persons can influence his decisions through petitions. Brief for Federal Appellee at

25-26. Merrell did telephone the EPA and demand that it immediately suspend the pesticide registrations of pesticides used near his wife's farm. S.E.R. at 1-6. Two weeks after his telephone calls, he filed this lawsuit. Merrell's rush to the courthouse does not lead us to conclude that public petitions to the Administrator are inevitably futile.[3]

FIFRA's review provisions do afford the public some opportunity to participate in pesticide registration decisions. The opportunity would be greater if NEPA applied. Congress has made its choice. We must abide by it.

AFFIRMED.

FOOTNOTES

1. FIFRA's disclosure limitation provisions do not necessarily conflict with the letter of NEPA. NEPA makes EIS's available to the public, subject to the requirements of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. 42 U.S.C. § 4332(2)(C); see Weinberger v. Catholic Action/Peace Educ. Project, 454 U.S. 139, 142-43 (1981). FOIA exempts from public disclosure matters specifically exempted by other statutes, trade secrets, and privileged or confidential commercial information. 5 U.S.C. § 552(b)(3)-(4). These exemptions could encompass all the information that FIFRA withholds from the public. But if NEPA applied to FIFRA's registration procedure, it would provide and additional legal basis on which disclosure could be sought. And the standards for disclosure developed under NEPA and FOIA might well differ from the standards developed under FIFRA.

2. FIFRA also provides for appellate court review of EPA orders issued after a public hearing, if an adversely affected party so requests. 7 U.S.C. § 136n(b).

3. We do not hold that Merrell's conduct amounted to a failure to exhaust administrative remedies. If Merrell had sued to cancel or suspend pesticide registrations, such a holding might be appropriate on these facts. See Merrell v. Thomas, 608 F. Supp. 644, 647-48 (D. Or.

PUBLISHER'S NOTE:

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1985) (finding that Merrell failed to exhaust his administrative remedies). But Merrell sued instead to compel the EPA to comply with NEPA when registering pesticides under FIFRA. Faced with a similar suit against a different agency, we concluded that a plaintiff was not obliged to exhaust his statutory remedies, because 28 U.S.C. § 1331, NEPA, and section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702, combined to create an independent ground of jurisdiction. Jones v. Gordon, 792 F.2d 821, 824 (9th Cir. 1986) (suit to set aside permit granted under the Marine Mammal Protection Act of 1972 because no EIS had been prepared). On that basis, we reach the merits in this case.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL E. MERRELL, Plaintiff-Appellant, v. LEE THOMAS, Defendant-Appellee, and CIBA-GEIGY CORPORATION, et al., Defendants-Intervenors,	No. 85-4026 DC# CV-84-6185-E ORDER

Before: SNEED, KENNEDY, and KOZINSKI, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PAUL E. MERRELL, Plaintiff, v. LEE THOMAS,[1] Defendant, and CIBA-GEIGY CORPORATION, DOW CHEMICAL COMPANY, VELSICOL CHEMICAL CORPORATION, NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION, AND OREGONIANS FOR FOOD & SHELTER, INC. Defendant Intervenors.	)	Civ. No. 84-6185-E OPINION AND ORDER

Plaintiff Paul E. Merrell, a resident of Lincoln County, Oregon, brought this action for injunctive relief to set aside the right-of-way use registrations of seven herbicides issued by the Environmental Protection Agency ("EPA"), or its predecessor, under the Federal Insecticide,

Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136, et seq. The seven herbicides whose right-of-way use registrations have been challenged here are Garlon 4, Krenite, dicamba, simazine, diuron, bromacil, and Rodeo.[2] Plaintiff, however, has not alleged that EPA registered these pesticides in violation of any provisions of FIFRA. Instead, he alleges that EPA was required to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq., before it could properly register the seven specified herbicides and that absent compliance with NEPA, the registrations under FIFRA should be held invalid.

This case is presently before the Court on dispositive motions filed by all parties. Plaintiff has moved for partial summary judgment, relying primarily on the Ninth Circuit's recent ruling in SOS v.

Clark, 747 F.2d 1240 (9th Cir. 1984) ("SOS"), and the doctrine of collateral estoppel. Defendant Ruckelshaus (hereinafter "EPA"), defendant-intervenors Ciba Geigy, et al., and defendant-intervenor Oregonians for Food and Shelter have each filed motions to dismiss or for judgment on the pleadings. Because evidentiary matter is submitted with the dispositive motions of defendant and defendant-intervenors, I treat all as summary judgment motions under Rule 56. See Fed. R. Civ. P. 12(b), (c).

None of the material facts is in dispute. Except as noted herein, factual assertions (which may be in dispute) in the evidentiary materials are not relevant to the legal issue before the Court: whether the FIFRA registration process is subject to the procedural requirements of NEPA. It is uncontested that EPA (and its

predecessor) complied with FIFRA, but not with the procedural requirements of NEPA in registering the seven herbicides at issue here. Having considered each of the written motions and oral arguments presented thereon, I find and hold that defendant and defendant-intervenors are entitled to judgment as a matter of law. Accordingly, I grant defendants' motions and deny plaintiff's motion for partial summary judgment.

Merit is lacking in plaintiff's contention that EPA is collaterally estopped from litigating the question of whether EPA must comply with NEPA in registering pesticides under FIFRA. The SOS decision upon which plaintiff relies does not require EPA to comply with NEPA before it registers herbicides under FIFRA. The Ninth Circuit's statement in SOS, that "[t]he EPA registration process for

herbicides under FIFRA is inadequate to address environmental concerns under NEPA," 747 F.2d at 1248, is simply not applicable to the issue here. The quoted statement means only that an agency engaged in a program of pesticide use, to which NEPA does apply, cannot rely solely on FIFRA pesticide registration as a substitute for its own obligation to prepare an impact statement analyzing the environmental impacts of using a certain herbicide in a given location. The Ninth Circuit did not address the issue that is here. Collateral estoppel has no application here. See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); United States v. Stauffer Chemical Co., ___ U.S. ___, 104 S. Ct. 575 (1984).

Courts have uniformly refused to apply NEPA's requirements to EPA's regulatory responsibilities under any environmental

protection statutes which it administers. E.g., Amoco Oil Co. v. EPA, 501 F.2d 722, 749 (D.C. Cir. 1974); Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 384-387 (D.C. Cir. 1973), cert denied, 417 U.S. 921 (1974); Twitty v. North Carolina, 527 F. Supp. 778, 783 (E.D.N.C. 1981), aff'd without opinion, 696 F.2d 992 (4th Cir. 1982); Maryland v. Train, 415 F. Supp. 116, 121-22 (D. Md. 1976).[3]

In addition, three courts have specifically addressed the question of whether NEPA is applicable to EPA in its regulation of pesticides under FIFRA. Wyoming v. Hathaway, 525 F.2d 66, 71-73 (10th Cir. 1975), cert. denied, 426 U.S. 906 (1976); EDF v. EPA, 489 F.2d 1247, 1254-1257 (D.C. Cir. 1973); EDF v. Blum, 458 F. Supp. 650, 661-62 (D.D.C. 1978). These courts uniformly have declined to require EPA, under NEPA, to duplicate the

environmental analysis already performed under the FIFRA registration process. Furthermore, these courts have found that the FIFRA action at issue was the functional equivalent of a NEPA analysis. Finally, NEPA does not apply to EPA's exercise of regulatory authority "unless Congress specifically has so directed." Maryland v. Train, 415 F. Supp. 116, 122 (D. Md. 1976). Congress has not so directed with respect to NEPA.

Congress, under FIFRA, established a comprehensive scheme for the registration and regulation of pesticides, the purpose of which is to "protect man and his environment." S. Rep. No. 92-838, 92d Cong., 2d Sess. 1 (1972). See Ruckelshaus v. Monsanto Co., ___ U.S. ___, 104 S. Ct. 2862, 2867 (1984). FIFRA requires the registration of a pesticide upon a determination, inter alia, that it will not

cause "unreasonable adverse effects on the environment." 7 U.S.C. §§ 136a(c)(5). EPA, pursuant to the statute, has promulgated exacting scientific testing requirements for the determination of adverse effects. See 40 C.F.R. Part 158, published at 49 Fed. Reg. 42856 (1984). The Administrator is required to publish in the Federal Register any application for registration of a new pesticide or a new use pattern which has been filed and any comments received. 7 U.S.C. § 136a(c)(4). Further, 136h(d)(1) provides for the release of health and safety data of registered pesticides, including "information concerning the effects of [a] pesticide in the environment, including, but not limited to, data on safety to fish and wildlife, humans, and other mammals, plants, animals, and soil, and studies on persistence, translocation and fate in the

environment, and metabolism . . ." See also Monsanto Co., 104 S. Ct. at 2880. Finally, an individual who is dissatisfied with the Administrator's decision to register a pesticide may petition the Administrator that it be cancelled or suspended. See EDF v. EPA, 489 F.2d at 1247. The failure to suspend or cancel is a decision subject to judicial review. 7 U.S.C. § 136n(a), (b).

In accordance with the principles set forth in the cases discussed previously, I find that FIFRA's substantive and procedural provisions for the protection of the environment satisfy the objectives of NEPA, and that Congress simply has not required that EPA superimpose NEPA upon the pesticide registration process. I would emasculate FIFRA if I were to do so.

Notwithstanding plaintiff's effort to dress his claims in NEPA clothing this

action is governed by FIFRA. The relief which plaintiff seeks in this action is, in effect, the cancellation or suspension of the registrations of the pesticides named in the complaint. FIFRA provides the exclusive mechanism to obtain this relief. The facts alleged, even assuming them to be true and considering them in the light most favorable to the plaintiff, do not show that EPA failed to comply with FIFRA in registering the named pesticides. Therefore, even assuming that I have jurisdiction over this matter, plaintiff is not entitled to prevail.

In addition, I find that plaintiff has failed to exhaust his administrative remedies under FIFRA prior to commencing this action for cancellation or suspension of the registrations.

If plaintiff has reason to believe that these pesticides may cause

unreasonable adverse effects on the environment, he may petition the Administrator to cancel or suspend their registrations. If the Administrator's decision is adverse, plaintiff may seek judicial review. Merrell has not availed himself of any of these remedies. Instead, less than one week after telephoning EPA to stop the alleged impending spraying action by Lincoln County, he filed this case. I find the limited contacts which Merrell has had with EPA do not constitute the exercise of the administrative remedies available to him under FIFRA. EPA has not been afforded an opportunity to apply its technical expertise to this matter. Meyers v. Bethlehem Corp., 303 U.S. 41, 50-51 (1938). Thus I am without jurisdiction to review the validity of the named pesticides.

For the foregoing reasons, the motions of defendant and defendant-intervenors are

granted and the case dismissed accordingly. Each party shall bear his or its own costs.

IT IS SO ORDERED.

DATED this ___ day of May, 1985.

/s/_____

United States District Judge

FOOTNOTES

1. Lee Thomas is substituted for William D. Ruckleshaus as the Administrator of the EPA pursuant to Fed. R. Civ. P. 25(d).

2. Bromacil, dicamba, diuron and simazine were first registered for use in maintaining roadside rights-of-way in 1966, 1967, 1966 and 1958, respectively. These registrations were issued by the United States Department of Agriculture, EPA's predecessor in pesticide regulation. Glyphosate (the active ingredient in Rodeo) and Krenite were first registered for right-of-way use in 1974 and 1975, respectively. Garlon 4 was first registered for right-of-way use in 1980. THe latter three pesticides were registered by EPA. See affidavit of Douglas D. Campt, Director, Registration Division, Office of Pesticide Programs, EPA, submitted in support of EPA motion for summary judgment, at ¶ 16.

3. See also Essex Chemical Corp. v. Ruckelshaus, 486 F.2d 427, 430-431 (D.C. Cir. 1973), cert. denied, 416 U.S. 969 (1974); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1305-1306 (10th Cir. 1973; Duquesne Light Co. v. EPA, 481 F.2d 1, 9 (3rd Cir. 1973); Buckeye Power, Inc. v. EPA, 481 F.2d 162, 173-174 (6th Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650, n.130 (D.C. Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495, 508 (4th Cir. 1973); Getty Oil Co. (Eastern Operations) v. Ruckelshaus, 467 F.2d 349, 359 (3d Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

Addendum: I granted these motions by means of an oral opinion at the hearing on December 12, 1984; thereafter I was asked to issue a written opinion. This is it, and it adds to, and somewhat clarifies my oral opinion.

APPENDIX D

§ 136a. Registration of pesticides [FIFRA § 3]

(a) Requirement.-- Except as otherwise provided by this subchapter, no person in any state may distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person any pesticide which is not registered with the Administrator.

. . . .

(3) Time for acting with respect to application.-- The Administrator shall review the data after receipt of the application and shall, as expeditiously as possible, either register the pesticide in accordance with paragraph (5), or notify the applicant of his determination that it does not comply with the provisions of the subchapter in accordance with paragraph (6).

§ 136h. [FIFRA § 10]

. . . .

(b) Disclosure.-- Notwithstanding any other provision of this subchapter and subject to the limitations in subsections (d) and (e) of this section, the Administrator shall not make public information which in his judgment contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential, except that, when necessary to carry out the provisions of this subchapter, information relating to formulas of products acquired by authorization of this subchapter may be revealed to any Federal agency consulted and may be revealed at a public hearing or in findings of fact issued by the Administrator.

(c) Disputes.-- If the Administrator proposes to release for inspection

information which the applicant or registrant believes to be protected from disclosure under subsection (b) of this section, he shall notify the applicant or registrant, in writing, by certified mail. The Administrator shall not thereafter make available for inspection such data until thirty days after receipt of the notice by the applicant or registrant. During this period, the applicant or registrant may institute an action in an appropriate district court for a declaratory judgment as to whether such information is subject to protection under subsection (b) of this section.

(d) Limitations.--

(1) All information concerning the objectives, methodology, results, or significance of any test or experiment performed on or with a registered or previously registered pesticide or its

separate ingredients, impurities, or degradation products, and any information concerning the effects of such pesticide on any organism or the behavior of such pesticide in the environment, including, but not limited to, data on safety to fish and wildlife, humans and other mammals, plants,animals, and soil, and studies on persistence, translocation and fate in the environment, and metabolism, shall be available for disclosure to the public: Provided, That the use of such data for any registration purpose shall be governed by section 136a of this title: Provided further, That this paragraph does not authorize the disclosure of any information that --

(A) discloses manufacturing or quality control processes,

(B) discloses the details of any methods for testing, detecting, or

measuring the quantity of any deliberately added inert ingredient of a pesticide, or

(C) discloses the identity or percentage quantity of any deliberately added inert ingredient of a pesticide, unless the Administrator has first determined that disclosure is necessary to protect against an unreasonable risk of injury to health or the environment.

(2) Information concerning production, distribution, sale, or inventories of a pesticide that is otherwise entitled to confidential treatment under subsection (b) of this section may be publicly disclosed in connection with a public proceeding to determine whether a pesticide, or any ingredient of a pesticide, causes unreasonable adverse effects on health or the environment, if the Administrator determines that such disclosure is necessary in the public interest.

(3) If the Administrator proposes to disclose information described in clause (A), (B), or (C) of paragraph (1) or in paragraph (2) of this subsection, the Administrator shall notify by certified mail the submitter of such information of the intent to release such information. The Administrator may not release such information, without the submitter's consent, until thirty days after the submitter has been furnished such notice: Provided, That where the Administrator finds that disclosure of information described in clause (A), (B), or (C) of paragraph (1) of this subsection is necessary to avoid or lessen an imminent and substantial risk of injury to the public health, the Administrator may set such shorter period of notice (but not less than ten days) and such method of notice as the Administrator finds appropriate.

During such period the data submitter may institute an action in an appropriate district court to enjoin or limit the proposed disclosure. The court may enjoin disclosure, or limit the disclosure or the parties to whom disclosure shall be made, to the extent that --

(A) in the case of information described in clause (A), (B), or (C) of paragraph (1) of this subsection, the proposed disclosure is not required to protect against an unreasonable risk of injury to health or the environment; or

(B) in the case of information described in paragraph (2) of this subsection, the public interest in availability of the information in th4e public proceeding does not outweigh the interests in preserving the confidentiality of the information.

(2)

No. 87-52

In the Supreme Court of the United States

OCTOBER TERM, 1987

PAUL E. MERRELL, PETITIONER

v.

LEE THOMAS, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the procedural requirements of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, are applicable to decisions by the Environmental Protection Agency granting registration applications under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. (& Supp. III) 136 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 807 F.2d 776. The opinion of the district court (Pet. App. C) is reported at 608 F. Supp. 644.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1986. The petition for rehearing

was denied on April 6, 1987 (Pet. App. B). The petition for a writ of certiorari was filed on July 3, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. (& Supp. III) 136 *et seq.*, regulates the marketing and use of pesticides. See *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984). Since the enactment of FIFRA in 1947, Congress has required that any pesticide product distributed in interstate commerce be registered with the federal government. Ch. 125, § 3(a)(1), 61 Stat. 166. See *Monsanto*, 467 U.S. at 990-991.[1] As originally enacted the statute regulated only the labeling and marketing of pesticides. In 1972, Congress revised the statute extensively to deal with heightened concerns about the environmental effects of pesticide use and with problems that had arisen in the registration system (Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973). While recognizing a need for significantly increased environmental protection and a desire for more public disclosure of information on the effects of pesticides, Congress also concluded that pesticides produce substantial benefits and that the needs of pesticide producers to protect trade secrets and confidential business information should be accommodated. See S. Rep. 92-838, 92 Cong., 2d Sess. 1-5 (1972). In the 1972 amendments,

[1] The Department of Agriculture administered the pesticide registration program until 1970, when the newly-created Environmental Protection Agency succeeded to these responsibilities. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623; *Monsanto*, 467 U.S. at 991.

Congress set about the task of accommodating these disparate interests.

When the 1972 amendments became effective FIFRA directly regulated, for the first time, pesticide use as well as pesticide labeling and marketing (*Monsanto*, 467 U.S. at 991-992). In addition, the amendments supplied a new substantive criterion for registration: that the pesticide would not cause "unreasonable adverse effects on the environment" (§ 3(c)(5)(C)-(D), 86 Stat. 980-981), which Congress defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide" (§ 2(bb), 86 Stat. 979). The legislation also required the Environmental Protection Agency (EPA) to apply the new standard to all previously registered pesticides and to review and reregister these products. (§ 4(c)(2), 86 Stat. 999). The new standard was also incorporated into the administrative procedures for cancellation and suspension of pesticides (§ 6(b) and (c), 86 Stat. 984-985).

Another feature of the 1972 amendments was the establishment of a mandatory licensing scheme for the health and safety data applicants were required to submit in order to obtain a registration. This system permitted EPA to consider data submitted by one company to approve applications for similar products from other persons (§ 3(c)(1)(D), 86 Stat. 979-980). See *Monsanto*, 467 U.S. at 992. Congress also addressed the question of public disclosure of data submitted to EPA by requiring the agency to publish a notice in the Federal Register of each application for registration if the pesticide contained "any new active ingredient or it would entail a changed use pattern," to allow 30 days for public

comment (§ 3(c)(4), 86 Stat. 979-980). EPA was further directed to make the data required for registration available to the public within 30 days of registration (§ 3(c)(2), 86 Stat. 980). This requirement, however, was specifically qualified by the provisions of Section 10, 86 Stat. 989, which protected the property interests of applicants by permitting them to designate portions of their submissions to EPA as trade secrets or confidential business information, and which prohibited EPA from disclosing that information if the agency concluded the data "contain[ed] or relat[ed]" to trade secrets or confidential business information.[2]

These provisions, particularly the definition of trade secrets, were the subject of much litigation that led to decisions which effectively prevented the disclosure of health and safety data and barred consideration by EPA of such data to register other pesticide products. See *Monsanto*, 467 U.S. at 993. To correct this and other problems, Congress again amended the FIFRA in the Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819. The 1978 amendments continued the prohibition on disclosure of trade secrets and confidential business information, but with a specific qualification to authorize disclosure of health and safety data *after* registration

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[2] The sole exception to this ban on disclosure permitted EPA, "when necessary to carry out the provisions of this Act," to reveal information relating to formulas to other Federal agencies or "at a public hearing or in findings of fact issued by the Administrator [of EPA]" (§ 10(b), 86 Stat. 989). The Administrator was required to notify the applicant who submitted the data 30 days before any proposed release of information in order to provide the applicant an opportunity to seek judicial review (§ 10(c), 86 Stat. 989).

(7 U.S.C. (& Supp. III) 136h(d)).[3] Congress also enacted protections to guard against disclosure to foreign and multinational pesticide producers either before or after registration: Section 10(g) prohibits EPA from knowingly disclosing any submitted information to such entities or to persons intending to deliver the information to such entities (7 U.S.C. 136h(g)).

The 1978 amendments also added a provision (§ 3(c)(8)) intended to govern EPA's *public* administrative review of the risks and benefits of any pesticide, a review EPA undertakes before deciding whether to conduct formal proceedings to cancel, suspend, or deny a registration (7 U.S.C. 136a(c)(8)). EPA may not conduct such a *public* review unless it "is based on a validated test or other significant evidence raising prudent concerns of unreasonable adverse risk to man or the environment" (*ibid.*).[4]

2. Petitioner brought this action seeking to cancel the registration of seven herbicides licensed un-

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[3] This authorization does not permit disclosure of any information regarding manufacturing or quality control processes, or information disclosing the identity of, percentage quantity of, or testing methodology for deliberately added inert ingredients, except when necessary to protect against an unreasonable risk to health or the environment. 7 U.S.C. 136h(d)(1)(A), (B) and (C).

[4] Congress also expected EPA to provide registrants an opportunity, through private written communication, to address and resolve the agency's concern about the risk posed by any pesticide prior to initiating public review. S. Conf. Rep. 95-1188, 95th Cong., 2d Sess. 35-36 (1978). The purpose was to "furnish a greater degree of protection for the property rights of pesticide registrants and ameliorate the indictment-like characteristics of the [interim review] process" (*id.* at 36).

der FIFRA that a local road department planned to spread along a road near his wife's farm (Pet. App. 2a). Petitioner first placed a telephone call to EPA asking that the planned spreading be halted, and less than one week later he filed this lawsuit (see E.R. 1; S.E.R. 1-2).[5] The complaint sought relief *not* on the ground that the continued use of these pesticides failed to meet the criterion of FIFRA that registered pesticides not cause "unreasonable adverse effects on the environment," but on the ground that EPA's extensive procedures for the review of the environmental effects of pesticides did not comply with the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. (& Supp. III) 4321 *et seq.* (E.R. 7-9).

Several chemical companies holding registrations for the particular pesticides at issue, and their trade association, intervened as defendants. The district court granted summary judgment for the defendants and dismissed the complaint, holding that the environmental review conducted by EPA before issuing registrations under FIFRA satisfied the objectives of NEPA, and therefore that EPA had no independent obligation to comply with the NEPA procedures (Pet. App. 25a-29a).

3. The court of appeals unanimously affirmed. Its opinion canvassed the various amendments to FIFRA in 1972, 1975, 1978, and 1984, which comprehensively revised the statute and which were all enacted after the passage of NEPA. The court concluded that in these complex, highly detailed amendments, Congress had designed, and then redesigned, a pesticide regis-

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[5] "E.R." refers to the Excerpt of Record petitioner filed in the court of appeals; "S.E.R." refers to the Supplemental Excerpt of Record the government filed in the court of appeals.

tration scheme that attempted to reconcile the interests of the public in expanded environmental protection and increased information about pesticides, with the interests of the manufacturers of pesticides in protecting trade secrets and confidential business information (Pet. App. 8a-26a). In the court's view, the fragile balance Congress achieved only after repeated consideration of the appropriate way for EPA to evaluate and protect against the environmental risks of pesticide use, allowed no room for the largely redundant procedures of NEPA, a statute which also requires federal agencies to take a " 'hard look' " at the environmental consequences of their actions. See *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976). The court further observed that the broad public disclosure provisions of NEPA stood in stark contrast to the regime Congress enacted in FIFRA, and concluded that there was no indication that Congress intended the NEPA procedures to upset FIFRA's delicate balance (Pet. App. 9a-10a, 15a-16a, 21a-22a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore not warranted.

1. Petitioner's principal contention is that the court of appeals has resolved the question of the potential conflict between NEPA and FIFRA inconsistently with this Court's decision in *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776 (1976). The Court held in *Flint Ridge* that where a federal agency's duty under another statute gives rise to an "irreconcilable and fundamental conflict" or a "clear and unavoidable conflict" with obliga-

tions NEPA might impose, the agency is excused from complying with NEPA (426 U.S. at 788). In order to suggest that the court of appeals applied a different standard, petitioner places almost exclusive reliance on the court's use of the word "incompatible" (Pet. App. 11a) in place of this Court's synonymous formulation.[6] Petitioner is mistaken.

The judgment in this case stems not from the court of appeals' application of a less stringent rule than required by *Flint Ridge*, but from the court's analysis of the significant limitations prescribed by Congress on the public disclosure of information during the registration process and on public participation in that process. FIFRA requires EPA to conduct a thorough review of the environmental consequences

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[6] In fact, the court of appeals' use of the term "incompatible" (Pet. App. 11a) occurs only in its discussion of one element of the FIFRA's statutory scheme—the provision of the statute, added in 1972, in which Congress directed EPA to act on registration applications "as expeditiously as possible." See 7 U.S.C. 136a(c)(3). The court below reviewed and relied on significantly more of the history of FIFRA, including the extensive amendments in 1975 and 1978 and their legislative history, which showed a clear congressional intent to design a registration process that balanced the competing interests of the public and the pesticide manufacturers (Pet. App. 8a-18a). The court's conclusion that application of NEPA is incompatible with Congress's direction to expedite the registration process is plainly correct. EPA processes up to 16,000 applications every year (S.E.R. 28), and while not all of them would require a complete environmental impact statement, the NEPA procedures that petitioner seeks to impose would severely impair EPA's ability to administer the pesticide registration program. As the court of appeals recognized (Pet. App. 13a-16a), it was precisely Congress's purpose, in amending and revising this statute on several occasions, to break the gridlock that had paralyzed the registration system.

of registration, but petitioner consistently ignores that Congress, in its various revisions of the registration process, also restricts EPA's ability to conduct that environmental review on a public basis. The court of appeals determined, after a comprehensive review of the statutory scheme, that application of the NEPA procedures "would sabotage the delicate machinery that Congress designed to register new pesticides" (Pet. App. 15a-16a). That conclusion is unassailable.

Petitioner maintains (Pet. 15) that application of NEPA would "require EPA to disclose more fully the impacts of such registration," yet petitioner concedes (Pet. 8) that "[i]f FIFRA prohibited the type of public participation that NEPA requires there would be a conflict." Petitioner errs in asserting (Pet. 8) that there is no such conflict.

FIFRA itself places significant limitations on EPA's ability to provide for public participation in the registration decision and to disclose information prior to the grant of a registration. Contrary to petitioner's argument (Pet. 10 n.10), Section 10(d) of FIFRA does not require disclosure of information about environmental impacts *prior to registration*; that Section applies only to "a *registered or previously registered* pesticide * * *" (7 U.S.C. (& Supp. III) 136h(d) (emphasis supplied)). Other provisions of the statute prevent any significant disclosure or opportunity for public participation in the initial registration decision (*e.g.*, 7 U.S.C. 136a(c)(8) (imposition of evidentiary threshold prior to public review of registration or registration application)); 7 U.S.C. 136h(b) (EPA must honor legitimate claims of trade secrets and confidential business information); 7 U.S.C. 136h(g) (bar on the disclosure of *any*

information submitted by applicants to foreign and multinational pesticide producers, whether directly or indirectly by general publication)).

FIFRA's legislative history confirms that Congress did not intend to permit disclosure of data prior to registration. In 1972, the Senate bill amending FIFRA would have permitted the release of toxicological data prior to registration. 118 Cong. Rec. 32258. See S. Rep. 92-970, 92d Cong., 2d Sess. 3, 20 (1972); S. Rep. 92-838, 92d Cong., 2d Sess. Pt. 2, at 70 (1972). In conference, however, the Senate receded, and the "liberal[ized]" disclosure provisions were eliminated from the bill. H.R. Conf. Rep. 92-1540, 92d Cong., 2d Sess. 34 (1972). A deletion of a provision in conference "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulfport Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974).

The statutory limitations on public disclosure and participation, amplified by the legislative history, demonstrate that a clear conflict exists between the requirements of FIFRA and those of NEPA. The court of appeals expressly found such an inconsistency (Pet. App. 9a, 12a, 15a, 24a, 29a), concluding that the amendments to FIFRA in 1972, 1975, and 1978, represent Congress's repeated attempts to fine-tune the "careful balance between 'the legitimate right of the public to know the basis for agency decisions and the right of a business to see that the manufacturing process and other trade secret information controlled by the Act are not disclosed for the commercial advantage of competing business interests'" (*id.* at 15a, quoting H.R. Rep. 95-663, 95th Cong., 1st Sess. 18-19 (1977)). Simply put, EPA cannot, consistent with its obligations under

FIFRA, grant the kind of public participation in the consideration of applications for registration that petitioner demands. In analogous circumstances, this Court has held that NEPA cannot be construed to require an agency to abandon its particular statutory obligations. *Flint Ridge*, 426 U.S. at 788. See *Weinberger* v. *Catholic Action/Peace Education Project*, 454 U.S. 139, 145-146 (1981); *United States* v. *SCRAP*, 412 U.S. 669, 694 (1973) ("NEPA was not intended to repeal by implication any other statute").[7]

2. Petitioner's remaining points are simply variations on the same theme. Contrary to petitioner's argument (Pet. 10-15), the court did not refuse to adhere to this Court's precedents disfavoring implied repeals and exhorting courts to harmonize, if possible, apparently conflicting statutes. See *Watt* v.

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[7] Petitioner places great reliance (Pet. 5-6, 9-10) on the court of appeals' observation (Pet. App. 31a n.1) that the application of the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. III) 552, which govern public disclosure under NEPA, might result in limitations on public disclosure that are identical or similar to those that result directly from FIFRA. *See Weinberger* v. *Catholic Action*, 454 U.S. at 145. On this observation petitioner premises his repeated assertion that the court found that EPA can comply with all the procedural requirements of both FIFRA and NEPA. Petitioner is incorrect. The court of appeals merely stated that it was unnecessary to determine the limits FOIA might place on disclosure. Whether the limitations on public disclosure and public participation in the registration process result from the application of FOIA or FIFRA, or some combination of the two, the fact remains that Congress in FIFRA deliberately precluded the kind of public disclosure and participation that petitioner seeks. That conclusion is dispositive of petitioner's claim.

Alaska, 451 U.S. 259, 267 (1981); *TVA* v. *Hill*, 437 U.S. 153, 189 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974). The basic interpretative standard used in these cases, irreconcilability, is the same one this Court has prescribed as the test for determining whether an agency's duties under one statute excuse it from complying with the procedures required under NEPA, which was the precise issue presented to the court below. See *Flint Ridge*, 426 U.S. at 788. In either situation, the question can be resolved only by a careful analysis of the two statutes and their requirements. As we have shown, the court below performed that analysis and concluded that the duties and responsibilities Congress assigned to EPA under FIFRA excused the agency from any duty to comply with NEPA when reviewing applications for pesticide registrations. Having reached that conclusion, the court had no need to do anything else since *Flint Ridge* and its progeny were the appropriate cases to apply. See also *Brown* v. *General Services Administration*, 425 U.S. 820, 834-835 (1976), and cases there cited. In any event, the result would not be different under the authorities upon which petitioner relies, since in practical terms the inquiry would be the same.

3. Finally, there is no basis for petitioner's concern (Pet. 4-5) that a major federal program has escaped the environmental review required by NEPA. On the contrary, as the court of appeals perceived (Pet. App. 9a, 21a-22a), FIFRA itself requires EPA to examine the environmental effects of pesticide registration. Thus, review under FIFRA satisfies the primary objective of NEPA: that agencies consider the environmental consequences of their decisions. See *Weinberger* v. *Catholic Action*, 454 U.S. at 143.

Indeed, it is on this very basis that many courts have exempted EPA, whose mission is to protect the environment, from the requirement to prepare an environmental impact statement when making decisions under the various statutes EPA administers, including FIFRA. *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1051 (D.C. Cir. 1978) (Clean Water Act); *Wyoming* v. *Hathaway*, 525 F.2d 66, 71-72 (10th Cir. 1975), cert. denied, 426 U.S. 906 (1976) (FIFRA); *Amoco Oil Co.* v. *EPA*, 501 F.2d 722, 749-750 (D.C. Cir. 1974) (Clean Air Act); *EDF, Inc.* v. *EPA*, 489 F.2d 1247, 1256-1257 (D.C. Cir. 1973) (FIFRA); *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 379-387 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974) (Clean Air Act); *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301, 1306 (10th Cir. 1973) (Clean Air Act); *Warren County* v. *State of North Carolina*, 528 F. Supp. 276, 286-287 (E.D.N.C. 1981) (Toxic Substances Control Act); *EDF, Inc.* v. *Blum*, 458 F. Supp. 650, 661-662 (D.D.C. 1978) (FIFRA); *Maryland* v. *Train*, 415 F. Supp. 116, 121 (D. Md. 1976) (Ocean Dumping Act).[8] Similarly, there is no need to require EPA to comply with NEPA in order to assure that the agency takes the required "hard look" at the environmental impacts of pesticide registration. See *Kleppe* v. *Sierra Club*, 427 U.S. at 410.[9]

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[8] Although the court of appeals did not base its decision on the functional equivalency doctrine applied in these cases, the court did not reject that doctrine, contrary to petitioner's assertion (Pet. 6). As the court noted (Pet. App. 21a), the legislative history indicates that Congress recognized that requiring an EIS would be redundant in light of EPA's mission. See S. Rep. 94-452, 94th Cong., 1st Sess. 9 (1975).

[9] Nor will this decision encourage other agencies to claim unwarranted exemption from NEPA simply because they

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1987

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have a statutory obligation other than NEPA to consider the environmental effects of their decisions. The result here turns on the analysis of a particular statute and its legislative history and offers no incentive to other agencies implementing different statutory schemes. See, *e.g.*, our currently pending brief in opposition in *Monongahela Power Co.* v. *Marsh*, No. 86-1642. (We are furnishing counsel for petitioner with a copy of that brief).

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